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26070-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

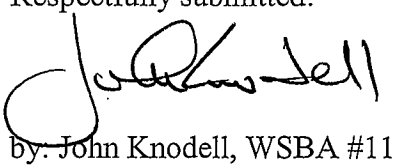
ROBERT BUSTAMANTE GONZALEZ, JR.,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT OF GRANT COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: John Knodell, WSBA #11284
Prosecuting Attorney

P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred when the trial court entered an amended restitution order in the instant case.

III. ISSUES

1. Whether a restitution statute, which provides that a court may modify a restitution order at any time a court has jurisdiction over a defendant, allows that court to increase a defendant's restitution to include medical expenses incurred after the entry of the original restitution order?
2. Whether a restitution order, which requires a defendant to compensate his victim for out-of-pocket expenses occasioned by that defendant's crime, is punitive or compensatory in nature for purposes of double jeopardy analysis?
3. Whether, even if a restitution order is punitive, the Double Jeopardy Clause prohibits revision of the restitution order to include amounts neither in existence nor discoverable at the time of entry of that order?

IV. STATEMENT OF THE CASE

On March 23, 2003, the Defendant Robert B. Gonzalez, Jr. attacked Denny Thoren with a metal bar and robbed him of his vehicle outside of a Moses Lake restaurant. CP 37. The Defendant gashed Mr. Thoren's head "open badly" and caused bleeding onto Mr. Thoren's face and coat. I RP 87, 90.[1] The Defendant shattered the upper right side of Mr. Thoren's face. I RP 167, 298-304. As a result of the attack, one of Mr. Thoren's eyes was pushed from its socket and permanently lost its function. I RP 87, 163-64, 307-08, 316-17. Mr. Thoren's injuries were consistent with being struck on the left and right side of the head with a fist, bat, crowbar, or some other blunt object. I RP 314-15. Because of the severity of his injuries, Mr. Thoren was taken to Samaritan Hospital and then airlifted to Harborview. I RP 121, 123, 165. Mr. Thoren, though gravely injured, survived.

On July 16, 2003, the Defendant was charged with assaulting Mr. Thoren and robbing him. CP 99-100, 101-102. Trial commenced on December 15, 2003, and concluded with jury verdicts of guilty of Assault in the First Degree and Robbery in the First Degree on December 19, 2003. CP 103, 104. On January 5, 2004, the Appellant was sentenced to 288 months

[1] Record references preceded by I indicate the clerk's papers or the report of proceedings in the Defendant's earlier appeal, COA No. 260704. The State has supplemented the record in the instant case with that report.

in prison. CP 111. The judgment and sentence included restitution to the crime victim compensation program in the amount of $21,306.45, representing medical, time loss and disability benefits paid on behalf of Mr. Thoren as of the date of sentencing. CP 109. The Defendant appealed his conviction and sentence, which were ultimately upheld in an unpublished opinion by this court. State v. Gonzalez, No. 22699-9-III.

On June 21, 2004, 168 days after sentencing, the State made a motion to amend the restitution amount. CP 37. The parties stipulated that additional restitution represented benefits paid on Mr. Thoren's behalf after the original restitution order. CP 38. A stipulated order was entered on June 28, 2004, establishing that "the total amount of restitution that should be paid is the sum of $20,886.66." CP 37. The Defendant does not challenge this order.

Mr. Thoren continued to accrue medical bills, which were paid from the crime victims fund. CP 41, 42-45. When Mr. Thoren reached maximum recovery from his injuries some time after the entry of the original restitution order, the Department of Labor and Industries paid him, in addition to the amount it had already paid, a permanent partial disability in the amount of $22,624.99. CP 46.

On June 30, 2006, 907 days after sentencing, the State moved for a

second amended order of restitution, seeking to add $25,661.30 in restitution to the crime victim's compensation program to the amount previously ordered. CP 38, 51. The State arranged for the Appellant's return from prison and noted its motion for hearing on July 17, 2006. CP 38, 51.

After a number of continuances, the State's motion for a second amended restitution order came on for hearing on January 2, 2007. CP 38. The Defendant did not challenge the amount requested, but argued that the State was statutorily barred from seeking further restitution because more than 180 days had elapsed since sentencing and because an order for restitution to the crime victim compensation program had been in place since the time of his sentencing. CP 38.

The trial court found that it had statutory authority to amend the amount of restitution so long as the Defendant continued under its jurisdiction, pursuant to RCW 9.94A.753(4). CP 37-39. It entered the proposed amended restitution order offered by the State, bringing the total restitution to $46,477.90. CP 53-54. The Defendant now appeals from that order.

V. ARGUMENT

A. RCW 9.94A.753 AUTHORIZES THE AMENDMENT OF A RESTITUTION ORDER TO INCLUDE EXPENSES NOT REASONABLY KNOWN TO THE STATE UNTIL MORE THAN SIX MONTHS AFTER CONVICTION

1. RCW 9.94A.753 Holds Defendants Responsible for Out-of-pocket Expenses Accruing More than Six Months after Sentencing.

When the Defendant bludgeoned Denny Thoren into unconsciousness, he shattered Mr. Thoren's facial bones, and blinded him in one eye. Mr. Thoren, a middle aged man, never fully recovered from these injuries. Only with the passage of years and years of medical treatment did he heal to the extent he was able.

Through the Crime Victim's Compensation Fund, the State of Washington paid for Mr. Thoren's medical treatment as his bills accrued, and, in accordance with the regulations governing that fund, ultimately compensated Mr. Thoren for the permanent partial disability he suffered as a result of the Defendant's attack.

The court initially ordered the Defendant to pay restitution at the time it entered judgment against the defendant. This restitution was based upon the figures available at that time. One hundred sixty-eight days later, the

prosecuting attorney moved the court to amend its restitution order to include medical expenses Mr. Thoren had incurred after the court had sentenced the Defendant. The court did so. Again, that motion was based upon the restitution figures available at the time.

But Mr. Thoren did not heal from the beating the Defendant inflicted upon him within six months after sentencing. In fact, Mr. Thoren required medical treatment for over three years after the Defendant attacked him, and only then had he healed to the extent that the State could evaluate the extent of his disability and compensate him for that disability.

When this process was complete and the State notified the prosecution of the amounts it had paid since the entry of the amended restitution order, the prosecution promptly notified the court and requested to amend the restitution order a second time. In this motion, the prosecuting attorney requested the court to order the Defendant to pay restitution in the amount of an additional $25,661.30 to the Crime Victims Compensation Program. CP 38, 51. Of this amount, $22,624.99 was composed of the permanent partial disability which the Department of Labor and Industries paid to Mr. Thoren after the entry of the first amended order. CP 46.

The Defendant objected to the entry of the second amended restitution

order claiming then, as he does now, that the amended restitution order violates RCW 9.94A.753. That statute provides that when restitution is ordered, the court must determine the amount of restitution at a hearing conducted within 180 days of the entry of judgment and sentence. RCW 9.94A.753(1). That was done in this case.[2] Nothing in the restitution statute prohibits amendment of a timely entered restitution order. In fact, the restitution statute provides as follows:

> For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of the time the offender remains under the court's jurisdiction, regardless of the expiration of offenders term of community supervision and regardless of the statutory maximum sentence for the crime.

RCW 9.94A.753(4) (emphasis added).

The plain language of this statute allows the court, at any time the offender remains under the court's jurisdiction, to modify the amount of restitution due. Because the language of the statute is plain and unambiguous, this court may not engage in statutory construction.

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[2] Because the court held a restitution hearing in this case within 180 days, State v. Tetreault, 99 Wn.App. 43, 998 P.2d 330, rev. denied 141 Wn.2d 1015 (2000), in which no hearing was held within 180 days of sentencing, is inapplicable.

State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). Under the plain language of the statute, once a valid restitution order has been entered, it may be amended, even as to amount, even after the defendant is no longer under court supervision.

The Defendant argues that the phrase "restitution may be modified as to amount" refers only to a change in the scheduled payment amount. Appellant's Brief at 5. This is unsupported by any authority or, for that matter, any argument and should be rejected out of hand. State v Mills, 80 Wn.App. 231, 907 P.2d 316 (1995). In essence, the Defendant asks this court to replace "restitution" with the phrase "scheduled payment amount" and, thereby, to rewrite the statute. The Defendant's reading also ignores RCW 9.94A.753(2) which specifically provides a mechanism for amending the scheduled payment amount. The Defendant's reading should be rejected because it essentially renders this provision meaningless. State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998). The Defendant's reading of the statute is at best a strained one, which would lead to the frustration of the purpose of the restitution statute: to require criminals to compensate their victims for out-of-pocket expenses.

2. The Washington Legislature Intended to Allow Courts to Hold Defendants Accountable for Ongoing Medical Expenses

Incurred over Six Months after Entry of Judgment and Sentence.

Even if there were any ambiguity in the restitution statute, the spirit and intent of the statute should prevail over its letter. If an act is subject to two interpretations, that which best advances the legislative purpose should be adopted. In re R., 97 Wn.2d 182, 641 P.2d 704 (1982). The restitution statute is designed to promote offender accountability and to promote compensation to victims and reflects a strong desire that victims receive restitution from offenders. State v. Goodrich, 47 Wn.App. at 116.

In interpreting that statute, this Court must recognize and give effect to this intent. State v. Eilts, 94 Wn.2d 489, 493, 617 P.2d 993 (1980). Therefore, statutes authorizing restitution are not given overly technical construction. State v. Christensen, 100 Wn.App. 534, 536, 997 P.2d 1010 (2000); State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991); State v. Bar, 99 Wn.2d 75, 79, 658 P.2d 1247 (1983).

The facts in the instant case illustrate how unworkable the Defendant's reading of the restitution statute is. The amount of restitution initially ordered in the Defendant's judgment and sentence represented the "actual" expenses incurred as of that date. RCW 9.94A.753(3). At that time, the State was not permitted to seek restitution for likely future expense, but

only restitution for costs actually incurred. State v. Goodrich, 47 Wn.App. 114, 733, P.2d 1000 (1997). Indeed, it was not possible to know what Mr. Thoren's *total* expenses would be. After the date of the sentencing hearing, Mr. Thoren continued to accrue medical bills and suffer lost wages as a direct result of the Defendant's assault. The legislature anticipated when it drafted the restitution statute that injury may be difficult to immediately assess. Accordingly, the statute permits modification of restitution orders "during any period of time the offender remains under the court's jurisdiction." RCW 9.94A.753(4); see also State v. Goodrich, 47 Wn.App. at 116-17.

The State's analysis is bolstered by the analysis of Division I in State v. Goodrich, supra. In that case, the court made the following observation:

> The statute empowers a court to order restitution for "*actual expenses incurred* for treatment for injuries to persons..." (Italics ours.) The State argues that a trial court should be allowed to order restitution based on testimony of projected future medical expenses. The statute does not provide for this. Instead, RCW 9.94A.140(1) offers an alternative:
>
> > For purposes of this section, the offender shall remain under the court's jurisdiction for a maximum term of ten years subsequent to the imposition of sentence. The portion of the sentence concerning restitution may be modified as to amount, terms and conditions during the ten-year period, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum for the crime.
>
> *This language states an intent by the Legislature to allow a court to increase a defendant's obligation to make restitution*

> *when a victim incurs further costs*. While this imposes a burden on the victim and the court to hold an additional hearing, it also enables the court to order restitution for the "actual medical expenses incurred." The trial court erred if it awarded restitution for future medical expenses not yet incurred by the victim.

State v. Goodrich, 47 Wn.App. at 116-17 (emphasis added).

Washington's restitution statute has been reenacted several times with only minor revisions since the Court of Appeals handed down its opinion in Goodrich. See RCW 9.94A.753, Historical and Statutory Notes.[3] This implies legislative acquiescence in the Court of Appeals' construction of the restitution statute. See Longview Fibre Co. v. Cowlitz County, 114 Wn.2d 691, 790 P.2d 149 (1990).

The plain language of the restitution statute does not, as Defendant argues, lead to unjust or inequitable results. The Defendant claims that allowing the State to seek amendment of the restitution order at any time, even "fifty years later," so long as an original order was entered within 180 days, could invite abuse. Brief of the Appellant at 8. First, that is not a proper challenge to the statute. Second, the premise is not true.

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[3] One revision expanded the court's jurisdiction over restitution from the ten year period(s) discussed in Goodrich to the current unlimited time period, providing that "[if] or an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime." Laws 2003, ch. 379 section 16.

The State cannot seek amendment at just any time. The State can only seek amendment on the basis of newly discovered evidence and must act promptly upon receipt of such evidence. CrR 7.5; CrR 7.8; CR 60. And in the instant case, there is no evidence of abuse. The amount of that original order was not $5, but $21,306.45. The number is not merely a place holder, as the Defendant suggests. This number represented the known damages accrued at that time to a specific victim for a specific purpose.

The plain language of the restitution statute, in conjunction with procedural court rules, allows the State, when acting promptly on new evidence to provide crime victims with full restitution, even when that restitution accrues over a period of years.

B. DOUBLE JEOPARDY ANALYSIS DOES NOT APPLY TO THE AMENDMENT OF RESTITUTION ORDERS

1. Double Jeopardy Prohibits Multiple Punishments, Not the Single Punishment Received by this Defendant.

Under the Defendant's logic every amendment of a judgment and sentence would be a violation of double jeopardy. There is no authority for his argument. Judgments and sentences are routinely amended. In this case, the statute explicitly permits it.

The Defendant is receiving a single punishment for his assault on Mr.

Thoren. There is only one case regarding the Defendant's liability for Mr. Thoren's injury. That is this case. There is only one sentence in this case: the judgment and sentence with the final amended restitution order. The amended orders are not multiple punishments. The final order supercedes or nullifies the preceding order, so that there is a single restitution order.

The Double Jeopardy Clause has no application to the Defendant's single punishment.

2. Amendment of the Defendant's Restitution Order to Add Reimbursement to His Victim for Medical Bills Did Not Violate the Defendant's Right to Be Free from Multiple Punishments.

Restitution orders, which are designed to compensate crime victims for out of pocket expenses incurred as a result of criminal acts, do not constitute punishment under double jeopardy analysis.

The Double Jeopardy Clause provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. U.S. CONST., amend. V; WASH. CONST., art. I, §9. The Double Jeopardy Clauses of the federal and state constitutions are interpreted in the same manner. State v. Hennings, 129 Wn.2d 512, 919 P.2d 580 (1996); see also State v. Glocken, 127 Wn.2d 95, 896 P.2d 1267 (1995) (The Double Jeopardy Clause in the Washington constitution does not extend broader individual rights to criminal

defendants than the Double Jeopardy Clause of the United States constitution).

While the Double Jeopardy Clause protects against the imposition of multiple punishments for the same offense, it applies only to multiple *criminal* punishments. See e.g., Helvering v. Mitchell, 303 U.S. 391, 399, 58 S.Ct. 630, 82 L.Ed. 917 (1958). The Double Jeopardy Clause does not prohibit the imposition of any additional sanctions that could, in common parlance, be described as punishment. It protects only against the imposition of multiple criminal punishments for the same offense, and then only when such occurs in successive proceedings. Hudson v. United States, 522 U.S. 93, 98-99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

For purposes of the Double Jeopardy Clause, whether a particular punishment is criminal or civil is, a least initially, a matter of statutory construction. Hudson v. United States, 522 U.S. at 99-100. A court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. If the legislature has indicated an intention to establish a civil penalty, courts then must inquire whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy

into a criminal penalty. Id.; see also People v. Harvest, 84 Cal. App. 4th 641, 101 Cal. Rptr. 2d 135 (2000).

a. The Legislature Intended RCW 9.94A.753 to Provide for a Civil, Not a Criminal, Penalty.

Whether a statutory scheme is civil or criminal is first of all a question of statutory construction. Smith v. Doe, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). This court must consider the text of Washington's restitution statute and its structure to determine the legislative objective. Flemming v. Nestor, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). Because the Washington legislature did not specifically label the restitution statute civil or criminal,[4] this court must look to the statutory text to determine the legislature's objective. Smith v. Doe, 538 U.S. at 93.

There are a number of reasons to conclude that the Washington legislature intended restitution as a civil remedy, and not a criminal penalty.[5] Restitution must be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons,

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[4] The Washington Supreme Court has expressed conflicting views on the subject. Compare State v. Schultz, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999) with State v. Kinneman, 158 Wn.2d 272, 280-81, 119 P.3d 350 (2005).

[5] Courts in other jurisdictions are split on the question of whether restitution orders are punitive for purposes of double jeopardy analysis. Compare People v. Harvest, 84 Cal.App. 4th 641, 650, 101 Cal.Rptr.2d 135 (2000); State v. Contreras, 885 P.2d 138, 142 (Ariz. 1994); Winter v. State, 587 N.E.2d 691, 692 (Ind.App. 1992); with People v. Shepard, 989 P.2d 183, 187 (Colo.App. 1999); McKerley v. State, 448 S.E.2d 85 (Ga. App. 1994).

and lost wages resulting from injury. RCW 9.94A.753(3). In assessing restitution, a sentencing court must take into consideration the total amount of restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have. RCW 9.94A.753(1). The restitution statute on its face serves no purpose other than to reimburse victims for monetary loss resulting from the defendant's crime.

The case relied upon by the Defendant to establish that restitution is punitive, State v. Kinneman, supra, is distinguishable. The court there held that even if restitution were punitive a defendant is not entitled to a jury determination of restitution because imposition of restitution is discretionary. State v. Kinneman, 155 Wn.2d at 282. The court's characterization of restitution was unnecessary to this conclusion and therefore *dicta*. In re Marriage of Roth, 72 Wn.App. 566, 570, 865 P.2d 43 (1994). Further, even if the characterization were not *dicta*, the court was construing the restitution statute for purposes of analyzing a defendant's right to jury trial and not for purposes of the double jeopardy clause.

More importantly, Kinneman wrongly construed the restitution statute. The Kinneman Court misread that statute to allow the trial court to order restitution in excess of the amount necessary to compensate the victim.

Id. at 280. This is error. RCW 9.94A.753 provides in part:

> Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the offense.

This statute limits restitution to loss suffered as a result of the specific offense charged. State v. Johnson, 69 Wn.App. 189, 191, 847 P.2d 960 (1993) (costs of investigation properly assessed as restitution). But because the victim's loss may exceed the defendant's gain, (id.) and because the defendant's gain from his crime may exceed the victim's loss, (State v. Fleming, 75 Wn.App. 270, 877 P.2d 243 (1994) (restitution order may be based on appreciated value of property taken)), the statute acts to limit excessive restitution orders resulting from anomalous circumstances where either the Defendant's gain is disproportionate to the victim's loss or vice versa. Nothing in the statute is inconsistent with its requirement that the restitution order be based on actual out-of-pocket loss.

The legislature created a statutory scheme whereby the state

establishes restitution by only a preponderance of the evidence at a hearing without a jury. State v. Dennis, 101 Wn.App. 223, 6 P.3d 1173 (2000). It further provided for the restitution order to function as a civil judgment in that the state or the victim may enforce the court ordered restitution in the same manner as a judgment in a civil action. RCW 9.94A.753(9). By contemplating that restitution be enforced through "distinctly civil procedures" our legislature indicated clearly that it intended a civil and not a criminal sanction. Smith v. Doe, 538 U.S. at 96; United States v. Ursery, 518 U.S. 267, 289, 116 S. Ct. 2135, 135 L.Ed. 2d 549 (1996). Because our legislature enacted the restitution statute pursuant to its power and obligation to protect the health and safety of its citizens, it evidenced an intent to exercise that regulating power, and not a purpose to add to a defendant's punishment. Smith v. Doe, 538 U.S. at 93-94.

b. The Washington Restitution Statute Is Not Punitive in Effect.

If the court determines that the Washington restitution statute was intended by the legislature as a civil, rather than criminal, penalty, it then should look to the factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S.Ct 554, 9 L.Ed.2 644 (1963) in determining whether the effect of the restitution statute is so punitive in purpose or effect as to

transform it into a criminal penalty. These factors include 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as a punishment; 3) whether it comes into play only on a finding of a scienter; 4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether an alternative purpose to which it may rationally be connected is assignable for it; and 7) whether it appears excessive in relation to the alternative purpose assigned. It is important to note that these factors must be considered in relation to the statute on its face and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil penalty into a criminal penalty. Hudson v. United States, 522 U.S. at 99-100.

The effect of Washington's restitution statute is not punitive. An examination of the factors listed in Kennedy v. Mendoza-Martinez supports the conclusion that the restitution statute is civil in nature. The first factor is whether the sanction involves an affirmative disability or restraint. The second is whether restitution has historically been regarded as a punishment. The purpose of victim restitution is compensation, which does not involve an affirmative disability or restraint and has not been regarded as punishment.

People v. Harvest, 84 Cal. App. 4th at 650. The restitution statute makes no mention of scienter and is separate from provisions specifying punishments for subsequent offenses. In fact, even foreseeability is not a necessary element of a restitution order. State v. Wilson, 100 Wn.App. 44, 995 P.2d 1260 (2000). Although restitution may have a punitive element, it is far less important than the goal and alternative purpose of providing compensation to a victim of crime. Id. Because restitution is limited to actual and demonstrated economic loss, it can hardly be condemned as excessive to the stated purpose of compensation. These factors when considered in conjunction with the plain statutory language provides nothing like "the clearest proof" needed to override the legislature's intent that victim restitution is a civil remedy and not a criminal penalty. Hudson v. United States, 522 U.S. at 100.

c. The Constitutional Prohibition Against Multiple Punishments Does Not Prohibit a Subsequent Increase of the Restitution Amount If That Increase Is Based upon Facts Not in Existence at the Time of the Entry of That Order.

Even if the Double Jeopardy Clause applies to restitution orders, it does not bar increases in the restitution amount if, when jeopardy arguably attached to the lesser amount upon the entry of the original order, the facts

essential to support the greater amount of restitution were not in existence or were not discoverable by the State in the exercise of due diligence. See Diaz v. United States, 223 U.S. 442, 448-49, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (defendant properly prosecuted for homicide after conviction for assault where victim dies of injuries incurred in assault twenty-six days after assault conviction); Illinois v. Vitale, 447 U.S. 410, 420 n.8, 100 S.C.t 2260, 65 L.Ed.2d 228 (1980); Brown v. Ohio, 432 U.S. 161, 169 n.7, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1997); State v. Higley, 78 Wn.App. 172, 180, 902 P.2d 659 (1995); State v. McMurray, 40 Wn.App. 872, 874, 700 P.2d 1203 (1985) (double jeopardy does not preclude prosecution of convicted drunk driver for vehicular homicide where victim dies after DUI conviction); State v. Escobar, 30 Wn.App. 131-35, 633 P.2d 100 (1981) (same). This principle is generally called the Diaz exception.

In order to prove the facts necessary for an increase of the original restitution order, the State was required to demonstrate not only that Mr. Thoren had actually incurred the expenses, but also that the Department of Labor and Industries had paid out monies to cover the medical bill and to cover his partial permanent disability. State v. Vinyard, 50 Wn.App. 888, 751 P.2d 339 (1988); State v. Goodrich, supra. The State could not have met

this burden of proof prior to receiving notification that these amounts had been paid out.

It takes time to assess serious head injury and determine if it is temporary or permanent in nature. Mr. Thoren suffered severe blunt force trauma to the head (I RP 314-15) which shattered his facial bones (I RP 167, 298-304) and drove one eye from its socket causing loss of sight. I RP 87, 163-64, 307-08, 316-17. It takes time to treat an injury as debilitating as that suffered by Mr. Thoren. It is undisputed that at the time of the entry of the original restitution order, the State did not know what specific additional medical expenses Mr. Thoren would incur. Moreover, the Department of Labor and Industries could not have fully assessed Mr. Thoren's permanent partial disability at that time. The trial court did not find (nor has the Defendant alleged or demonstrated) that the State had failed to act with due diligence in discovering the facts necessary to bring its motion to amend the restitution order. Therefore, even if the Washington restitution statute is punitive in nature, for purposes of the Double Jeopardy Clause, constitutional prohibitions against double jeopardy do not preclude amendment of a restitution order under the facts of this case.

d. Because the Defendant Had No Reasonable, Objective and Legitimate Expectation of Finality in the First Restitution Order Entered in His Case, Double Jeopardy Does Not Prohibit Amendment of That Order.

Generally, double jeopardy protections do not apply to sentencing proceedings because entry of a sentence does not create the constitutional finality that attends acquittal. Monge v. California, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998); United States v. DiFrancesco, 449 U.S. 117, 134, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); State v. Hardesty, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996). For purposes of double jeopardy analysis, there is a fundamental distinction between a sentencing determination and a determination of guilt or innocence. A sentence does not have the same quality of finality as an acquittal. United States v. DiFrancesco, 449 U.S. at 132-36; State v. Hardesty, 129 Wn.2d at 310.

In order for a determination made at a sentencing hearing to have the effect of acquittal under a double jeopardy analysis, the defendant must have an objective, reasonable, and legitimate expectation of finality in that sentencing determination. State v. Hardesty, 129 Wn.2d at 311. Whether a defendant has a legitimate expectation of finality in any portion of a sentence will depend upon many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant's misconduct in obtaining the sentence. Id. Defendants do not enjoy an expectation of finality where the law provides that their sentences may be modified. State v. Hardesty, 129 Wn.2d at 313-14.

Thus, In DiFrancesco the United States Supreme Court held that the defendant there lacked an expectation of finality in his sentence because he was charged with knowledge that the racketeering statute provided for review of the sentencing determination, and the government had promptly sought review within the relevant statutory time period. United States v. DiFrancesco, 449 U.S. at 136-39.

In State v. H.J., 111 Wn.App. 298, 44 P.3d 874 (2002), the respondent was found guilty, sentenced, and then resentenced with a manifest injustice finding when the State realized that the original sentence was not in compliance with the Juvenile Justice Act. On appeal, the respondent claimed that the resentencing violated the constitution's prohibition against double jeopardy. The court rejected his argument finding that the respondent had no legitimate expectation of finality because the applicable Washington statute put him on notice that his initial sentence was not in compliance with the law.

In the same way, the defendant in the instant case was put on notice by statute, RCW 9.94A.753(3), that his restitution order could be modified to provide for additional restitution. He also, having sat through his own trial, knew how severely he had injured his victim and undoubtedly knew as well of the long term medical problems his victim would have as well as the probability of residual disability. Given these facts, the defendant could have no legitimate objective or reasonable expectation that the amount of

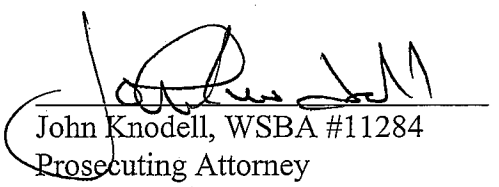
restitution originally ordered by the court would be all of the restitution that he would eventually have to pay.

VI. CONCLUSION

For the reasons stated above, the trial court's entry of a second amended restitution order should be affirmed.

DATED: March 21, 2008.

Respectfully submitted:



John Knodell, WSBA #11284
Prosecuting Attorney